

DIANA DEE PETERS
Claimant

KANSAS EYE CARE, PA
Respondent

TRAVELERS INSURANCE COMPANY
Insurance Carrier

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

ORDER

ISSUES

FINDINGS OF FACT

Claimant alleges that on or about September 1, 1999, she was assisting an elderly patient to a chair when the patient fell. Claimant attempted to help the patient up and, in the process, claimant injured her low back. Claimant mentioned her injury to co-workers, but did not report the accident to her supervisor because she thought the symptoms were temporary and would go away. One of the co-workers claimant talked to was Teri, who is the head

technician. But claimant does not allege that Teri was a supervisor or an individual the employer had otherwise authorized to receive notice.

Claimant had experienced previous episodes of back pain from assisting patients, and had been able to work through the symptoms, which had always before resolved eventually. This time claimant did what she had done before. She applied ice and took over-the-counter medications. On or about October 1, 1999, with the pain not decreasing, claimant had her first conversation with Steven A. Kuhl, O.D., the clinical director and her immediate supervisor, about her accident. She informed him that she just could not lift patients anymore because of the injury she had sustained approximately one month before while helping a patient up. Dr. Kuhl did not offer to or suggest to claimant that she should fill out a notice of accident form. Claimant sought treatment on her own from Kathryn Van Winkle-Patyk, D.C., on October 4, 7 and 21, 1999. Thereafter, on October 28, 1999, she was seen on one occasion by Mary A. Lynch, M.D.

CONCLUSIONS OF LAW

The preliminary hearing Order should be affirmed.

The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.¹ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.²

The Workers Compensation Act requires a worker to provide the employer timely notice of a work related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the

¹ K.S.A. 1999 Supp. 44-501(a).

² K.S.A. 1999 Supp. 44-508(g).

giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.³

According to her own testimony, the earliest claimant provided notice to respondent was during the conversation with Dr. Kuhl on or about October 1, 1999, which is beyond the 10-day notice period.

Therefore, claimant relies upon the provision in K.S.A. 44-520 that permits time for giving notice to be extended to 75 days from the date of accident if claimant's failure to notify respondent within 10 days was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work related accident and whether the respondent had posted notice as required by K.A.R. 51-12-2(a).

Although claimant had suffered previous traumas, the accident on September 1, 1999 was a specific traumatic event. There is no question but that claimant was aware she had injured her low back and that the injury was directly attributable to her employment. Claimant described what happened after the patient fell as follows:

And as I was attempting to help lift her up off the floor, she – it was like she was – even though she was petite she was like dead weight. She couldn't assist herself. And she really pulled on my lower back. And I know at that point that it was very painful and I thought something was wrong. And I could not help her get up myself.⁴

In this instance, claimant's September 1, 1999 accident was a sudden and traumatic event which caused her significant pain. The only explanation presented regarding claimant's failure to report the accident is that she thought the injury was temporary and would resolve.

³ K.S.A. 44-520.

⁴ Prel. H. Tr. at 16.

Claimant had suffered prior incidents of back pain while working for respondent which had been temporary and which she had decided not to report. Nevertheless, claimant admits she was aware of respondent's policy to immediately report all work related injuries. It is also undisputed that the employers' mandatory notice information poster was posted in the staff lounge.

One of the purposes of the notice requirement is to give the employer an opportunity to provide prompt medical attention and, when appropriate, accommodate restrictions designed to prevent further injury. Had claimant reported those prior incidents, respondent would have had an opportunity to accommodate claimant and perhaps make changes in claimant's job duties that could have prevented this last injury.

The Board finds claimant has failed to prove that there exists just cause to extend the time for giving notice to 75 days. Therefore, the request for benefits should be denied.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁵

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated April 18, 2001, entered by Administrative Law Judge Nelsonna Potts Barnes, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

c: J. Greg Kite, Wichita, KS
William L. Townsley III, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

⁵ K.S.A. 44-534a(a)(2).